Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

FRANK L. FARROW,

Petitioner,

v.

JOHN E. POTTER, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTION PRESENTED FOR REVIEW

The question presented for review is: Did the lower Courts, by their irrational decisions and erroneous interpretations of laws and precedents set forth by the Petitioner in his civil charge, abuse their discretion and thus violate the Petitioner's Constitutional Rights to *Due Process* in the form of *Discovery* and then prevent the Petitioner from presenting his large amount of evidence to a proper jury in accordance with the *7th Amendment to the U.S. Constitution*, even though both lower Courts had full knowledge of the similar case of ***Cynthia L. Taylor v. Marvin T. Runyon, USPS*, 175 F.3d 861 (11th Cir. May 1999)**, in which both lower Courts acted justly and corrected the U.S. District Court from unjustly denying Appellant Cynthia L. Taylor her right to a trial by jury in her *Title VII Retaliation Claim* against the USPS and properly reversed this clear abuse of discretion, which this Petitioner is equally entitled to as well, according to the *14th Amendment*, but was willfully denied equal protection under the law?

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OPINIONS BELOW

The order sought to be reviewed is the District Court's Order Granting Defendant's Motion For Summary Judgment, entered on August 8, 2001, prematurely and without just cause, before this Petitioner could even begin the discovery phase of his civil action in order to gather additional evidence to further establish and prove his legitimate charges against the United States Postal Service to an impartial jury for lawful redress.

The Circuit Court of the Eleventh Judicial Circuit affirmed the District Court's Order Granting Defendant's Motion For Summary Judgment on March 22, 2002.

The Circuit Court of the Eleventh Judicial Circuit entered its order denying Appellant's Motion For Rehearing on June 21, 2002.

BASIS FOR JURISDICTION

This Honorable Court has jurisdiction to hear this matter pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes involved in this case are the 1st, 5th, 7th and 14th Amendments to the U.S. Constitution; the *Anti-Retaliation Clause of Title VII* of the Civil Rights Act of 1964 secs. 701-718, as amended, 42 U.S.C.A., secs. 2000e-2000e-17; the 29 CFR 1614; the Federal Rules for Civil Procedure, and the Common Law.

STATEMENT OF THE CASE

Citing this Petitioner's *Complaint And Demand For Jury Trial* (Doc 1) filed on December 12, 2000, and his *Amended Complaint* filed on April 30, 2001 (Doc 22), this Petitioner clearly set forth a viable cause of action, subject matter jurisdiction, and had clearly stated a claim of violation of the *Anti-Retaliation Clause of Title VII* upon which relief could be granted, supported by documented physical evidence submitted in the form of numerous exhibits, as well as circumstantial evidence that was more than sufficient to survive any premature and baseless *Motion To Dismiss*.

Using the standards established by the 11th Circuit Court in the case of *Cynthia L. Taylor v. Marvin T. Runyon, USPS*, No. 97-3202 (11th Cir. May 4, 1999) Appeal from the United States District Court Of Florida, (95-410-CIV-ORL-18), G. Kendall Sharp, Judge, this Petitioner has already submitted sufficient evidence to proceed to a trial by jury and should be permitted to do so without further deprivation of his 7th Amendment right.

This Petitioner gave the United States Postal Service, (USPS) full and fair notice and every opportunity to correct the alleged intentional retaliation by the USPS, at the Informal and Formal Stages of the EEO process. The USPS had foreknowledge that the natural progression of the EEO charge through the USPS's own biased internal processing would become a Civil Action, especially after all other methods of redress were either completely exhausted by the Petitioner or unlawfully denied to this Petitioner.

The USPS has always refused to correct, or even conduct a lawful investigation into, said alleged intentional retaliation through its own biased internal processing, as required by 29 CFR Part 1614.101(b) which clearly

states, "No person shall be subject to retaliation for opposing any practice made unlawful by Title VII of the Civil Rights Act."

Furthermore, 29 CFR Part 1614.102(2) requires the USPS to, "provide for the prompt, fair and impartial processing of complaints in accordance with this part and the instructions contained in the Commission's Management Directives," which has never been done due to the alleged malicious, intentional, and reckless disregard for this Petitioner's rights by the USPS, because of the North Florida District of the USPS's secret, but easily proven, policy of reverse discrimination against white males who exercise their right to file legitimate EEO charges, as per 29 CFR 1614, which is clearly evidenced by the fact that for the past twelve years and continuing, said North Florida District refuses to hire or promote white males into the USPS EEO Dispute Resolutions Department or to lawfully resolve any EEO charges filed by this Petitioner and allegedly utilizes the Postal Management to retaliate, harass, discredit and attempt to coerce any white males, this Petitioner in particular, to be silent on the fact that for the past twelve years, and continuing, the USPS NFD Equal Employment Opportunity Dispute Resolution Department has had an unlawful and discriminatory "*no white males allowed*" policy in their EEO Department, which continues to this day and continues to unlawfully deny this Petitioner his right to Equal Opportunity Employment as per 29 CFR 1614 and similar Postal Policies, causing this Petitioner great harm that can now only be remedied with a trial by jury, which the USPS has allegedly utilized the U.S. Attorney's Office and the Judges of the lower courts to unlawfully prevent this Petitioner from ever presenting the approximate 12,000 pages of documented

evidence proving this Petitioner's legitimate charges to an impartial jury, which is clearly his Constitutional right to do so, as per the 7th Amendment.

As a direct result, the USPS has a long and well-documented history, gathered solely by this Petitioner, and presented to the USPS, who has been allegedly retaliating against the Petitioner, in all manner and form, up to and including wrongful termination without just cause in retaliation for known prior protected EEO activity and in an unlawful effort to prevent the Petitioner from ever having an EEOC hearing or trial by jury to permanently correct and finally make full restitution for what is now an alleged twelve-year campaign by the USPS to intentionally inflict as much harm as possible upon the Petitioner and to try to unlawfully coerce him into surrendering his right to be provided with a non-hostile working environment; to be provided with "the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs and other training measures so that they may perform at their highest potential and advance with their abilities," as per 29 CFR 1614.102(12) and to effectively use the EEO process to immediately correct any and all forms of retaliation at the local level and within the USPS without being constantly forced by the USPS to exhaust all remedies through their biased EEO process, while the USPS always refuses to attempt to make any settlement offers at any level or to take any meaningful corrective action to act in accordance with 29 CFR 1614.102(3) & (6) and always refuses to even attempt to settle at any level even though (Doc 1 Exhibit B pgs 43 through 57) of this Petitioner's *Complaint And Demand For Jury Trial*, (Doc 1) clearly shows that the USPS is fully aware that it is in its own best interest to

settle this matter, and it is well within the power of the USPS to do so, but the USPS rather chooses not to even attempt to settle but instead increases their alleged harassment to silence this Petitioner through retaliation, due to his prior protected EEO Activities.

The USPS has never provided the Petitioner with a fair and impartial processing of any of his EEO complaints as evidenced by Doc 1 Exhibit B pgs 1 through 68, in the Petitioner's *Complaint And Demand For Jury Trial* (Doc 1), and the USPS has never interviewed or taken statements from the Petitioner's witnesses, but merely asked the charged party in the EEO complaint, if they had done anything wrong and since they said "no," this was sufficient, in their opinion, to show that there was allegedly no retaliation, in direct violation of 29 CFR 1614.102(c)(5) "assuring that individual complaints are fairly and thoroughly investigated and that final decisions are issued in a timely manner in accordance with this part."

This Petitioner has been forced to work in an extremely hostile management environment which has clearly altered all of the terms and conditions of his employment with the USPS, who, in direct violation of 29 CFR 1614.102(3) absolutely refuses to "conduct a continuing campaign to eradicate every form of prejudice or discrimination from the agency's personnel policies, practices and working conditions," and refuses, in direct violation of 29 CFR 1614.102(6) to, "take appropriate disciplinary action against employees who engage in discriminatory practices," and has chosen instead to conduct an unlawful campaign to maliciously force this Petitioner from the USPS and to forever prevent him from being promoted up to his present skill level of an EAS-24 or EAS-26 Postmaster, as well as to unlawfully prevent

him from ever having an EEOC hearing or a trial by jury to correct same and to expose the documented alleged corruption that is wide-spread throughout the USPS.

The USPS has even chosen to take unlawful, retaliatory and clearly false disciplinary action against this Petitioner for engaging in known prior protected EEO activities, which has caused the Petitioner great harm in the form of stress, lost wages, lost promotions, legal fees and expenses, and has forever altered the terms and conditions of his employment, which has been clearly established and claimed by this Petitioner over the past twelve years and continuing and can only be remedied with a trial by jury.

The Petitioner contends that his *Complaint And Demand For Jury Trial* (Doc 1) should *NOT* have been prematurely dismissed before he could even begin the discovery phase of his civil case, thus unjustly depriving him of his constitutional right to due process and equal justice, since Federal Rule of Civil Procedure 12(b)(6) clearly states,

> "This defense, unlike the other numbered ones in Rule 12, addresses the legal sufficiency of a claim as stated by its pleader under Rule 8(a)(2) as "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." In ruling on a 12(b)(6) motion, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. . . ." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). See *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 1827, 1832 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's

factual allegations."); *Hishon v. King & Spalding*, 104 S. Ct. 2229, 2233 (1984). In applying the *Conley* standard, the court will "accept the truth of the well-pleaded factual allegations of the complaint . . . [and] may properly look beyond the complaint only to items in the record of the case or to matters of general public record . . ." *Phillips v. Bureau of Prisons*, 591 F.2d 966, 969 (D.C. Cir. 1979). The court is likely to view the claim in the light most favorable to the claimant, see *H.J. Inc. v. Northwestern Bell Tel., Co.*, 109 S. Ct. 2893, 2906 (1989), but it need not accept legal conclusions and opinions as true, see *Mirin v. Justices of S. Ct. of Nevada*, 415 F. Supp. 1178, 1190 (D. Nev. 1976). See also *In re Cypress Semiconductor Secs, Litigation*, 864 F.Supp. 957, 958 (N.D. Cal. 1994) ("[T]he court may dismiss the complaint as a matter of law for either of two reasons: (1) the lack of cognizable legal theory, or (2) the pleading of insufficient facts under a cognizable legal theory."). "[A] district court may, in appropriate circumstances, note the inadequacy of the complaint and, on its own initiative, dismiss the complaint . . . Yet a court may not do so without at least giving plaintiffs notice of the proposed action and affording them an opportunity to address the issue." *Literature, Inc. v. Quinn*, 482 F.2d 372, 374 (1st Cir. 1973). While the Rule 12(b)(6) defense is often interposed, **it is viewed by the courts with disfavor and, it is granted in proportionately few cases**."

Federal Rule of Civil Procedure 8(a)(2) states,

". . . **Detail under the Rules, is achieved better during the discovery phase of litigation**. The "notice philosophy" embodied in subdivision (a)(2) is best exemplified by case decisions where

> the sufficiency of the pleader's statement is challenged by a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. For example, in *Conley v. Gibson*, 355 U.S. 41, 45-47 (1957), the court said that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief . . . The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' . . . that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

This Petitioner clearly complied with all of these requirements and had attached numerous pages of exhibits to his *Complaint And Demand For Jury Trial*, which went into great details of the circumstances regarding said complaint and the Petitioner believes that by restoring his Constitutional Right to Due Process in the form of discovery will further clarify the issues of his civil action. Since the USPS has always refused to provide the Petitioner with a fair, thorough, and impartial investigation of his EEO charge, however, this can be remedied by this Honorable Court by restoring this Petitioners constitutional right to a trial by jury in this matter, which is well over the $20 minimum required by the 7th Amendment, and then permitting the Petitioner to continue to gather evidence through the discovery process that would have been gathered, if the USPS EEO Dispute Resolution Department had acted in a diligent, lawful manner and performed their duty to act, rather than relying on the

lower courts to arbitrarily and capriciously dismiss this Petitioner's legitimate and well-documented charges.

Citing the case of *Cynthia L. Taylor v. Marvin T. Runyon, USPS*, 175 F.3d 861 (11th Cir. May 4, 1999) Appeal from the U. S. District Court of Florida. In said case, 11th Circuit Court Chief Judge Hatchett stated in footnote 2.,

> "While we have considered this evidence only as part of the circumstantial evidence in this case, we observe that if we had considered this as a direct evidence case, judgment as a matter of law would be inappropriate. See *Merritt*, 120 F.3d at 1189; *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 642 (11th Cir. 1998). "'Where the non-movant presents direct evidence that, if believed by the jury, would be sufficient to win at trial, [motion for judgment as a matter of law] is not appropriate even where the movant presents conflicting evidence.'" *Merritt*, 120 F.3d at 1189 (quoting *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996)).

Citing the case of *Cynthia L. Taylor v. Marvin T. Runyon, USPS*, 175 F.3d 861 (11th Cir. May 4, 1999) Appeal from the United States District Court of Florida, in which the 11th Circuit Appeals Court properly reversed the erroneous dismissal of said case by the U.S. District Court in Orlando, FL, since the burden for the *Anti-Retaliation Clause of Title VII* is supposed to be very light and a plaintiff is merely required to meet the *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993), standard, which only requires hearsay and circumstantial evidence and a good-faith belief that the charges are legitimate, which this Petitioner has clearly met.

Both lower courts' Judges are fully aware of their proper rulings in the similar case of *Cynthia L. Taylor v. Marvin T. Runyon. USPS*, 175 F.3d 861 (11th Cir. May 4, 1999), yet have knowingly and willfully refused to provide equal justice to this Petitioner by giving the same corrective action and proper ruling that was handed down by 11th Circuit Court Chief Judge Hatchett in the similar case of *Cynthia L. Taylor v. Marvin T. Runyon, USPS*, so that this Petitioner can proceed to a trial by jury in the exact same manner and for the exact same reasons as postal employee Cynthia L. Taylor, instead of this Petitioner being willfully deprived of his constitutional rights to a trial by jury and to equal protection under the law, regardless of his color, gender, or Pro Se Plaintiff status, of which both the lower courts are required to be blind to and are to have no other interests except seeing that justice is served and that this Petitioner is not deprived of his constitutional rights.

REASONS FOR GRANTING THE WRIT

Citing the case of *Turner v. Orr*, 804 F.2d 1223 (11th Cir. 1986) page 1227,

> ". . . A broad interpretation of the scope of Bess' general complaint would be consistent with the policies underlying the consent judgment and Title VII . . . Most importantly, this court has a strong interest in guaranteeing the equal employment opportunities mandated by Title VII. We thus adhere to the policy set out in Sanchez v. Standard Brands Inc.: Mindful of the remedial and humanitarian underpinnings of Title VII and of the crucial role played by the private litigant in the statutory scheme, courts constructing

> Title VII have been extremely reluctant to allow procedural technicalities to bar claims brought under the Act. Consequently, courts confronted with procedural ambiguities . . . have, with virtual unanimity resolved them in favor of the complaining party."

Further citing the case of *Hairston v. Gainesville Sun Pub. Co.,* 9 F.3d 913 (11th Cir. 1993), page 915, 10. Master and Servant, 40(4),

> "In order to establish that employer's stated reasons for adverse employment action is pretext for retaliation, employee is not required to introduce evidence beyond that already offered to establish prima facie case; evidence already introduced to establish prima facie case may be considered, and indeed, there may be some cases where employee's initial evidence, combined with effective cross-examination of employer, will suffice to discredit employer's explanation and establish pretext. Civil Rights Act of 1964, Sec. 701 et seq., 42 U.S.C.A. Sec. 2000e."

Again, citing the case of *Hairston v. Gainesville Sun Pub., Co.*, 9 F.3d 913, page 919,

> " . . . Courts have recognized that in discrimination cases, an employer's true motivations are particularly difficult to ascertain, see *United States Postal Service Board Of Governors v. Aikens*, 460 U.S. 711, 716, 103 S. Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (acknowledging that discrimination cases present difficult issues for the trier of fact, as "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes"), thereby making such factual determinations generally unsuitable for disposition at the summary judgment stage."

Citing the remarkably similar case of *Earnest Diamond v. William J. Henderson, USPS*, N.D. of Ill. (Chicago) No. 99-cv2893, who was also wrongfully terminated by the USPS in retaliation for his protected EEO activity, not only was Diamond provided with his 7th Amendment Right to a jury trial, but the jury was so shocked by the USPS's blatant violations of the *Anti-Retaliation Clause of Title VII*, that they not only awarded Diamond's requested damages for $150,000.00, on 02/07/02, but awarded him an additional $100,000.00 in damages for the USPS's flagrant and irrational violations of his civil and constitutional rights, plus legal fees.

Citing the case of *Linda J. Patrick v. William J. Henderson, USPS*, Appeal No. 00-2358 (8th Cir.) [US District Court, W. Arkansas No. 99-cv-5168], once again, proves that this Petitioner is well within his rights and has the constitutional right to a trial by jury in this matter since postal employee Linda J. Patrick had her erroneous District Court decision to dismiss her case reversed and remanded back for a trial by jury with the barest minimum of evidence, while this Petitioner possesses over 12,000 pages of documented evidence that if given his right to discovery can obtain an equal amount or more of documented evidence still being unlawfully withheld from this Petitioner by the USPS with the permission of the lower courts.

Citing the case of *Jarrell v. United States Postal Service*, 753 F.2d 1088 (D.C. Cir. 1985) 8. Federal Civil Procedure 2544, "... Party moving for summary judgment must show that there is no genuine issue to any material fact. Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A." This Petitioner has clearly demonstrated to both lower courts that the USPS has always failed to show that there is no genuine

issue to any material fact and has instead, allegedly refused to recognize the thousands of pages of documented physical evidence that the Petitioner has always provided, most of which are copies of the USPS's own records and documents, and have instead relied on the Judges of the lower courts to allegedly engage in judicial misconduct and unjustly and erroneously award the USPS's premature and baseless *Motion to Dismiss* before this Petitioner could even proceed with his right to discovery.

Citing the case of *McGuire v. U.S. Postal Service*, 749 F. Supp. 1275 (S.D.N.Y. 1990) "For the purpose of the Title VII retaliation claim, casual connection between protected activity and adverse employment action can be proved either directly or indirectly by showing that protected activity is followed by adverse treatment . . ."

Finally, citing the case of *Trevino v. Celanses Corp.*, 701 F.2d 397 (5th Cir. 1983), pages 406-407, section C. Summary Judgment, clearly states,

> ". . . As previously noted, the district court read Trevino's complaint to allege no more than a simple failure-to-hire. When those facts ascertained under the court's limited discovery order failed to fit this particular Procrustean bed, the court concluded that Trevino and Trevino's lawyer were wasting its time, entered summary judgment against Trevino, and awarded attorney's fees to Celanese and ABI. Trevino, however, never made the bed in which he was told to lie, and should not be asked to pay for it.
>
> [12] Under Federal Rule of Civil Procedure 56, **summary judgment is appropriate only where everything in the record – pleadings, depositions, interrogatories, affidavits, etc.,**

> **– demonstrates the absence of any genuine issue of material fact**. [emphasis added] *Erco Industries Limited v. Seaboard Coastline Railroad Company*, 644 F.2d 424 (5th Cir. 1981) . . . The district court may normally grant summary judgment only when the moving party has established his right to judgment with such clarity that the nonmoving party cannot recover . . . under any discernible circumstance."

Everhart v. Drake Management, Inc., 627 F.2d 686, 690 (5th Cir. 1980).

> "Where, as here, a court simply declines to entertain the theory of recovery advanced by the plaintiff, its determination that there exists no genuine issue of material fact under the theory it applies cannot be supposed to extended to facts material under the rejected theory. We reverse the District Court's award of summary judgment not because **the Court decided factual issues properly reserved for trial**, but because it failed to determine that there was no genuine issue of fact material to the action pleaded and argued by plaintiff . . ."

The Petitioner believes that he is well within his rights to file for a *Writ Of Certiorari* in order to confine the inferior courts to a lawful exercise of its prescribed jurisdiction and to compel both to exercise their authority lawfully since it is their duty to do so and neither court should be permitted to usurp judicial power reserved solely for a jury and both courts have clearly abused their discretion for the sole purpose of allegedly unlawfully shielding the USPS from its liabilities and responsibility for its duty to act in accordance with the law as it is written.

This Petitioner contends that he has, in fact, easily established his prima facie case of Title VII Retaliation by showing statutorily protected expression; adverse employment actions; and a casual link between the protected expression and adverse actions. See *Goldsmith v. City Of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993).

The Petitioner directly participated in EEOC Case No. 150-AO-8755X/Agency Case No. 1-H-321-0097-00, filed on or about **June 2, 2000**, and then was immediately subjected to unlawful retaliation on **June 6, 2000**.

The Petitioner respectfully requests that this Honorable Court restore his 7th Amendment right to him so that he may present his overwhelming evidence to an impartial jury for a proper verdict, rather than permitting the lower courts to usurp the authority reserved solely for a jury and then conduct an extremely biased and unlawful trial by motion to allegedly intentionally deprive this Petitioner of his constitutional rights and render the 29 CFR 1614, the *Anti-Retaliation Clause of Title VII*, as well as the 1st, 5th, 7th and 14th Amendments of no force or effect, leaving this Petitioner without a method of redress and subject to blatant alleged retaliation by the USPS with unlawful impunity.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted by this Honorable Court.

Respectfully submitted on this 6th day of August 2002,

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-16096
Non-Argument Calendar

D.C. Docket No. 00-01648-CV-ORL-22

FRANK L. FARROW,

Plaintiff-Appellant,

versus

JOHN E. POTTER,
Postmaster General,
United States Postal Service,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(Filed March 22, 2002)

Before CARNES, HULL and FAY, Circuit Judges.

PER CURIAM:

Frank L. Farrow, proceeding *pro se*, appeals the district court's dismissal of his amended complaint for failure to state a claim under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-3. On appeal, Farrow argues that his amended complaint properly stated a retaliation claim under Title VII. Farrow claims that the United States Postal Service ("USPS") falsely led him to

believe that he was going to testify at an Equal Employment Opportunity Commission ("EEOC") hearing concerning another employee. We AFFIRM.

This Court reviews a grant of a motion to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim *de novo*, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. *Shands Teaching Hosp. and Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1310 (11th Cir. 2000). To establish a *prima facie* case of retaliation in violation of Title VII, a plaintiff must show: (1) a statutorily protected expression; (2) an adverse employment action; and (3) a causal link between the protected expression and the adverse action. *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001). For purposes of a retaliation claim under Title VII, an adverse employment action is either "an ultimate employment decision, such as discharge or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee," or conduct that meets "some threshold level of substantiality." *Bass v. Board of County Comm'rs, Orange County, Fl*, 256 F.3d 1095, 1118 (11th Cir. 2001) (citations omitted). "In evaluating what actions meet that required level of substantiality, . . . Title VII is neither a general civility code nor a statute making actionable the ordinary tribulations of the workplace." *Gupta v. Florida Board of Regents*, 212 F.3d 571, 587 (11th Cir. 2000), *cert. denied*, 531 U.S. 1076 (2001). The question of whether an employee has suffered an adverse employment action for purposes of a retaliation claim depends on the facts of each case. *See id.*

Upon review of the amended complaint and the district court's opinion, and upon consideration of the parties' briefs, we find no reversible error. We find that Farrow has not shown that he suffered an adverse employment action. Farrow alleged that he was told he was going to testify at an EEOC hearing, but then was informed that there was no hearing. As a matter of law, this allegation is insufficient to rise to even the liberal threshold level of substantiality required to support a *prima facie* case of retaliation. Moreover, Farrow has already been given the opportunity to cure the defects of his complaint. It is clear to this court that we need not grant any further opportunity for Farrow to amend his complaint, as there is simply no cognizable claim to articulate. *See Stevens v. Premier Cruises Inc.*, 215 F.3d 1237, 1239 (11th Cir. 2000) (holding that leave to amend need not be granted where an amendment would be futile). Therefore, because Farrow failed to allege that he suffered an adverse employment action, the district court did not err in dismissing his amended complaint with prejudice for failure to state a claim under Title VII.[1]

AFFIRMED.

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[1] Farrow relies heavily on *Taylor v. Runyon*, 175 F.3d 861, 869 (11th Cir. 1999) where an employee was granted relief by this Court on her claim of Title VII retaliation. However, this case offers no support for Mr. Farrow, because in *Taylor* we found that a *prima facie* case of retaliation had been established, and the district court had erred on other grounds.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FRANK L. FARROW,
Plaintiff,

Case No. 6:00-cv-1648-Orl-22DAB

-vs-

WILLIAM J. HENDERSON,

Defendant.

ORDER

(Filed Aug. 8, 2001)

This cause came before the Court for consideration of Defendant William J. Henderson's ("Henderson") Motion to Dismiss for failure to state a claim (Doc. No. 26), filed on May 29, 2001. Plaintiff Frank L. Farrow ("Farrow") instituted this action, alleging unlawful retaliation in violation of Title VII, by filing a complaint on December 12, 2000. (Doc. No. 1). Henderson subsequently filed a Motion to Dismiss for failure to state a claim on February 16, 2001 (Doc. No. 8). This Court issued on order on April 18, 2001, dismissing the complaint with leave to amend (Doc. No. 19). The motion was granted, based in part on Farrow's failure to sufficiently allege that he suffered an adverse employment action (Doc. No. 19). On April 30, 2001, Farrow filed his Amended Complaint (Doc. No. 22).

Henderson asks the Court to dismiss Farrow's Amended Complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), contending that Farrow has failed to cure the pleading defects that prompted dismissal of his

initial complaint (Doc. No. 8). Specifically, Henderson contends that Farrow still fails to allege an adverse employment action, and as such cannot establish a prima facie case of retaliation under Title VII. (*Id.* at 2).

In his Amended Complaint, Farrow alleges that he has been unlawfully retaliated against, stating that on June 5, 2001, he was "knowingly falsely informed and willfully and fraudulently mislead [sic] into believing that the Pro Se Plaintiff was being brought in to give testimony at an EEOC Administrative Hearing pertaining to EEOC Case No. 150-99-8178X" (Doc. No. 22 at ¶ 11). Farrow further states that he discovered that his supervisors "had allegedly knowingly and willfully lied and were engaging in alleged illegal activities again, that were clearly designed to cause great harm and to further attempt to unlawfully discredit and retaliate against the Pro Se Plaintiff and to unlawfully coerce the Pro Se Plaintiff into not giving testimony . . . " (*Id.* at ¶ 12). Farrow also states that "[t]his was clearly done for retaliation purposes and to illegally attempt to discredit the Pro Se Plaintiff and to intentionally interfere with the Pro Se Plaintiff's right to be able to give truthful testimony to the EEOC without constant harm in the form of unlawful reprisals and retaliation by the Postal Management . . . "(*Id.* at ¶ 14). Farrow finally states in his response to Henderson's motion, that "the USPS's unlawfully assuming, then abusing the authority of the EEOC to fraudulently conduct a false EEOC Administrative Hearing clearly constitutes unlawful retaliation since it could reasonably deter the Pro Se Plaintiff or any other reasonable person from engaging in protected activity . . . " (Doc. No. 30 at 14). In essence, Farrow alleges that he was misled into believing

that he would be providing testimony at an EEOC hearing concerning another employee.

Although Fed. R. Civ. P. 8(a) requires at a minimum that a pleading contain only "a short and plain statement of the claim," and even though a complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 78 S. Ct. 99, 102, 355 U.S. 41, 45-46, 2 L. Ed. 3d 80 (1957), Farrow has not met those extremely liberal standards.

42 U.S.C. § 2000e-3 makes it an unlawful employment practice:

> for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or particiapted [sic] in any manner in an investigation, proceeding, or hearing under this subchapter.

To establish a prima facie case of retaliation in violation of Title VII, a plaintiff must establish the following: (1) that he participated in a statutorily protected activity; (2) that he suffered an adverse employment action; and (3) that there exists a causal link between his participation in the protected activity and the adverse employment action. *Gupta v. Florida Bd. Regents*, 212 F.3d 571, 587 (11th Cir. 2000). To rise to the level of an adverse employment action, although such action need not be "an ultimate employment decision," such as a "discharge or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment,

deprives him or her of employment opportunities, or adversely affects his or her status as an employee," *Gupta*, 212 F.3d at 587, it still must meet "some threshold level of substantiality . . . to be cognizable under the anti-retaliation clause[.]" *Wideman v. Wal-Mart Stores*, 141 F.3d 1453, 1456 (11th Cir. 1998). Though "not everything that makes an employee unhappy is an actionable adverse action, . . . conduct that alters an employee's compensation, terms, conditions, or privileges of employment does constitute an adverse action under Title VII." *Bass v. Bd. of County Commissioners*, 2001 WL 765620, *19 (11th Cir. 2001) (internal citations omitted).

As a matter of law, Farrow's being told that he was going to testify at an EEOC hearing, but then being informed that there was no hearing, does not constitute an adverse employment action. Even if true, this alleged conduct does not meet the threshold level of substantiality to qualify as an adverse employment action. Farrow has already once been given the opportunity to cure the defects of his complaint; however, this is not a matter of Farrow being unable to articulate his claim. Rather, as articulated, Farrow's claim is not cognizable as a matter of law. Since it does not appear that Farrow can remedy his deficiency by a further opportunity to amend his complaint, dismissal of his case with prejudice is proper. *See Ziemba v. Cascade Intl., Inc.*, 2001 WL 776765, *16 (11th Cir. 2001); *see also* 5A Charles Wright & Arthur Miller, *Federal Practice and Procedure*, § 1357, at 365 (2d ed., West 1990).

Accordingly, it is ORDERED as follows:

1. Defendant William J. Henderson's Motion to Dismiss (Doc. No. 26), filed May 29, 2001, is GRANTED.

2. Plaintiff Frank L. Farrow's Amended Complaint (Doc. No. 22) is dismissed with prejudice.

3. The Clerk shall close this case.

DONE and **ORDERED** in Orlando, Florida this 8th day of August, 2001.

/s/ Anne C. Conway
ANNE C. CONWAY
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-16096-EE

FRANK L. FARROW,

Plaintiff-Appellant,

versus

JOHN E. POTTER,
Postmaster General, United States Postal Service,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

(Filed Jun. 21, 2002)

BEFORE: CARNES, HULL and FAY, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Frank L. Farrow is DENIED.

ENTERED FOR THE COURT
/s/ Peter Fay
UNITED STATES CIRCUIT
JUDGE
